CHAN MING CHENG

v.

PP

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CRIMINAL APPEAL NO: J-05-158-1997]
13 JUNE 2002

EVIDENCE: *Statement - Cautioned statement - Admissibility - Voluntariness - Whether burden on accused to show that statement was involuntary - Whether burden on prosecution to show that statement was voluntary - Accused showing suspicious circumstances surrounding making or recording of statement - Whether trial judge should have rejected cautioned statement*

EVIDENCE: *Confession - Voluntariness - Admissibility - Whether burden on accused to show that cautioned statement was involuntary - Whether burden on prosecution to show that cautioned statement was voluntary - Accused showing suspicious circumstances surrounding making or recording of cautioned statement - Whether trial judge should have rejected cautioned statement*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 37(da) - Whether presumption of trafficking under s. 37(da) can be invoked based upon presumption of possession under s. 37(d) - Rule against double presumptions - Muhammed Hassan v. PP [1998] 2 CLJ 170 FC - Whether accused's conviction for trafficking under s. 39B(1)(a) sustainable*

WORDS & PHRASES: *"appears to the court" - Dangerous Drugs Act 1952, s. 37A(1)(a) - Criminal Procedure Code, s. 113(a)(i) - Evidence Act 1950, s. 24 - Voluntariness and admissibility of cautioned statement*

The appellant was charged with trafficking in 154.3g of heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') and was convicted based principally upon his cautioned statement in which he admitted ownership of the heroin recovered from his room by the police. The trial judge had held, pursuant to a trial within a trial, that the appellant was unable to raise a reasonable doubt as to the voluntariness of his cautioned statement. This was the appellant's appeal and the central issue was whether his cautioned statement which was recorded under s. 37A of the DDA was rightly admitted.

Held:
Per Gopal Sri Ram JCA

[1] There is no burden on an accused person to prove that a statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also **no** burden on the accused to raise a reasonable doubt as to the voluntariness of his cautioned statement. The only burden on him is to show suspicious circumstances surrounding the making or recording of his cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible. Hence, as the appellant here was able to point to some circumstances which aroused suspicion, the trial judge ought **not** to have allowed his cautioned statement to be admitted in evidence. (pp 82 d, g-h & 83 a-f)

[2] Although there was adequate evidence to support the trial judge's invocation of the presumption of possession under s. 37(d) of the DDA against the appellant, the trial judge had thereafter proceeded to invoke the presumption of trafficking under s. 37(da) of the DDA against the appellant. This invocation of s. 37(da) of the DDA based upon s. 37(d) of the DDA violated the rule against double presumptions. (*Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC). Hence, the appellant's conviction for trafficking under s. 39B(1)(a) of the DDA could not stand and had to be substituted with a conviction under s. 12(2) of the DDA. (p 83 g-i)

[Appellant sentenced to 20 years' imprisonment and 12 strokes of the rattan under s. 39A(2)(a) of DDA.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') kerana mengedar 154.3 gram heroin dan disabit berdasarkan pernyataan beramarannya di mana ia mengaku menjadi pemilik kepada heroin yang dijumpai polis di dalam biliknya. Hakim perbicaraan telah memutuskan, dalam suatu perbicaraan dalam perbicaraan, bahawa perayu gagal membangkitkan keraguan munasabah terhadap kesukarelaan pernyataan beramarannya. Perayu merayu dan isu penting yang timbul ialah sama ada pernyataan beramaran yang direkodkan di bawah s. 37A ADB tersebut telah diterima masuk dengan betul dan teratur.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Tidak ada beban atas tertuduh untuk membuktikan bahawa pernyataan yang direkodkan darinya tidak diberi dengan sukarela. Beban sebaliknya adalah atas pendakwaan untuk membuktikan dengan positif bahawa pernyataan telah diberikan dengan sukarela. Juga, tiada beban atas tertuduh untuk membangkitkan keraguan munasabah berkaitan kesukarelaan pernyataan beramarannya. Beban yang ditanggung oleh tertuduh hanyalah untuk menunjukkan bahawa terdapat 'halkeadaan syakwasangka' dalam pemberian atau pemerolehan pernyataan beramaran tersebut. Selagi syakwasangka yang dibangkitkan itu munasabah dalam kaitannya dengan kesukarelaan pernyataan, maka ia menjadi tanggungjawab hakim perbicaraan untuk menolak dan tidak menerima masuk pernyataan tersebut. Dengan hal yang demikian, oleh kerana perayu di sini telah berjaya membuktikan beberapa halkeadaan di mana syakwasangka telah berbangkit, maka pernyataan beramaran beliau tidak seharusnya diterima masuk sebagai keterangan oleh hakim perbicaraan.

[2] Walaupun terdapat keterangan mencukupi bagi menyokong hakim perbicaraan apabila beliau menggunakan anggapan pemilikan di bawah s. 37(d) ADB terhadap perayu, hakim perbicaraan selepas itu telah menggunakan pula anggapan pengedaran di bawah s. 37(da) ADB terhadap perayu. Penggunaan s. 37(da) ADB berdasarkan kepada s. 37(d) ADB seperti yang dibuat oleh hakim perbicaraan adalah bercanggah dengan prinsip pemakaian anggapan (*Muhammed Hassan v. PP* [1998] 2 CLJ 170 MP). Oleh yang demikian, pensabitan perayu atas kesalahan pengedaran di bawah s. 39B(1)(a) tidak boleh dipertahankan dan ia harus diganti dengan sabitan di bawah s. 12(2) ADB.

Perayu dihukum penjara 20 tahun dan sebatan 12 kali di bawah s. 39A (2)(a) ADB]

Case(s) referred to:
Cheong See Leong v. PP [1948-49] MLJ Supp 56 ***(refd)***
Herchun Singh & Ors v. PP [1969] 2 MLJ 209 ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 ***(foll)***
PP v. Law Say Seck & Ors [1971] 1 MLJ 199 ***(foll)***
Sandra Margaret Birch v. PP [1978] 1 MLJ 72 ***(refd)***
Yap Chai Chai & Anor v. PP [1973] MLJ 219 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 113
Dangerous Drugs Act 1952, ss. 12(2), 37A, 37d, 39A(2)(a), 39B(1)(a)
Evidence Act 1950, s. 24

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Abdul Wahab Mohamed DPP (Muhamad Iskandar Ahmad DPP)

[Appeal from High Court, Johor; Criminal Trial No: 45-9-96]

Reported by Gan Peng Chiang

JUDGMENT

(oral)

Gopal Sri Ram JCA (delivering the judgment of the court):
On 13 January 1996 at about 3.45 in the morning, a police party raided premises No. 121, Jalan Rumbia 39, Taman Daya, Johor Bahru. It was a semi-detached house. They were led into the house by one Lee Poh Soon who was in the hall when the police party arrived. The police, having entered the house, proceeded to the room occupied by the appellant. The door was locked. They forced entry into the room. There is some dispute about what the appellant was doing when the police entered. But nothing turns on it. There was a table in the room. A search on one of the drawers, which was locked, revealed 4 large plastic packets, 4 medium sized and 9 small plastic packets containing a yellowish substance which was suspected to contain drugs. A search of the second drawer led to the recovery of 50 large plastic packets and 20 small plastic packets, all of which were empty. There is some dispute whether the appellant assisted in the opening of these drawers. Again, nothing turns on this.

The packets containing the yellowish substance were sent for chemical analysis which revealed that they contained 154.3 grams of heroin.

At the material time, that is to say when the police raided the room, there were three other persons in occupation of the house in question. One was Lee Poh Soon whom we mentioned a moment ago. The other two were PW9 and PW10, who were the appellant's workers at his stall. All the four persons were taken into police custody. Later they were released on 26 January 1996, except the appellant.

On 18 January 1996 at about 10am a cautioned statement was recorded from the appellant in which he admitted ownership of the drugs recovered from his room. The appellant was later charged for trafficking and convicted of that offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. ("the Act").

At the trial, the prosecution sought to tender the appellant's cautioned statement. Objection was taken. A trial within a trial then took place at which the recording officer, PW1, the interpreter of the statement, PW2 and the arresting officer, PW3 gave evidence. They denied any impropriety in the recording of the statement. PW1 and PW2 maintained that the statement was voluntarily given. It was put to each of them under cross-examination that the appellant had been induced to make the statement. It was put that the inducement was to the effect that if the appellant confessed to having possession of the drugs, PW9, PW10 and Lee Poh Soon would be released from custody. If he did not so confess then they would be all tried together for trafficking. The appellant also alleged on oath that he was given an assurance that in return for his confession he would not be charged in court but would merely be detained without trial.

The learned judge, after hearing the evidence in the trial within the trial, admitted the statement. When he came to give his reasons for that decision he said that the appellant had failed to raise a reasonable doubt as to the voluntariness of the cautioned statement.

Before us a number of points were taken for the appellant, including the argument that there had been a breach of the rule in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170, what has come to be known as the rule against double presumption. But it was readily conceded by Encik Hisyam Teh Poh Teik of counsel for the appellant that the validity of those arguments turned upon the admissibility of the cautioned statement. This concession was properly made by counsel. While an accused may not be convicted on the confession of a co-accused (see *Herchun Singh & Ors v. PP* [1969] 2 MLJ 209; *Yap Chai Chai & Anor v. PP* [1973] MLJ 219), an accused may be convicted on his own confession.

That brings us to the question whether the cautioned statement was rightfully admitted. Now this cautioned statement was recorded under s. 37A of the Act. That section contains a proviso which is a common feature of all such provisions appearing in different criminal statutes, including s. 113 of the Criminal Procedure Code.

In *Sandra Margaret Birch v. PP* [1978] 1 MLJ 72, Syed Agil Barakbah J (as he then was) pointed out that the proviso to s. 37A was in terms of s. 24 of the Evidence Act and housed the judges' rules.

The central feature of the proviso and s. 24 is the phrase "appears to the court". That phrase has been explained in a number of cases but we find it sufficient to refer to one of these. In *PP v. Law Say Seck & Ors* [1971] 1 MLJ 199 Sharma J said at p. 201:

> I have been told that the use of the word 'appears' in section 24 is very significant and the word 'proved' has purposely not been used by the legislature. I quite agree. A confession can, of course, be rejected on a valid ground or conjecture but there must be something before the court on which such a valid conjecture can rest. In this case I think there is sufficient evidence on which I can safely base a reasonably well founded belief in the hypothesis of a seeming inducement which avoids the confession under our laws. If the accused is able to point to some circumstances which arouse suspicion the confession cannot be admitted. A mere possibility that the confession was not voluntary is insufficient to warrant its rejection but a probability would suffice to dictate its rejection in evidence.

We would also refer to another passage in the said judgment, also at p. 201:

> Considering the age of the two accused and the other circumstances to which I have already referred, I may say that while I am quite prepared to believe PW 9, PW 12 & PW 15, I cannot say that I do not believe the two accused. I am not entitled to take that attitude merely because they appear as accused before me. They have given evidence on oath. The position thus is that I am unable to say that I disbelieve the accused and my mind is not free from doubt as to the voluntary nature of the confessions. In the result I hold that Exhibits P11 and P14 are not admissible and they will not be read, heard or used at the hearing of this trial.

What these passages amount to is this. There is no burden on an accused to prove that the statement recorded from him is involuntary. The burden lies on the prosecution to show positively that the statement was voluntarily given. There is also no burden on an accused to raise a reasonable doubt as to the voluntariness of a cautioned statement. The only burden on an accused is to show suspicious circumstances surrounding the making of or recording of the cautioned statement. So long as the suspicion is reasonable as to the voluntariness of the statement, it is incumbent on the trial judge to hold it inadmissible.

Now what are the suspicious circumstances here? First, there is the allegation by the appellant that if he confessed the other three would go free. To recall, the cautioned statement was recorded on 18 January 1996. Not long after, that is to say on 26 January 1996, the other three men were released. Secondly, the cautioned statement in its own terms raises a high degree of suspicion. Here we would adopt in its entirety the remarks made by our learned brother Abdul Kadir Sulaiman JCA, in the course of arguments this morning.

As our learned brother pointed out, a recording officer is meant to be an independent, uninterested person. See, *Cheong See Leong v. PP* [1948-49] MLJ Supp. 56. He would therefore be unaware of the facts of an accused's case or the circumstances surrounding his arrest or indeed the nature of the allegation against him. Yet, we find in this statement a single question addressed to the appellant asking him if he wished to say anything. The appellant's immediate response is to the effect that he admitted to being the owner of the heroin in question and that the three others did not know he was selling drugs. We find that to be a very strange response. It excites our suspicion because it appears to confirm what the appellant gave in evidence in the trial within a trial. It certainly ought to have excited the suspicion of the learned judge.

In our considered judgment, the appellant has therefore met the requisite legal test for the rejection of the cautioned statement. He was therefore entitled to a direction in that regard from the learned judge. However, a careful scrutiny of the judgment reveals no such direction. It is our respectful view that the learned judge applied the wrong test and accordingly misdirected himself on the evidence. The cautioned statement ought to have been therefore rejected by the learned judge and he would indeed have done so had he applied the correct test.

Having come to the conclusion that the cautioned statement ought not to have formed any part of the evidence, we are satisfied that the conviction of the appellant under s. 39B of the Act cannot be sustained. However, there is, in our respectful view, abundant evidence to support the finding of the learned judge that the appellant was in possession of the proscribed drug. The requirements of s. 37(d) of the Act are therefore satisfied.

The difficulty here is that the learned judge proceeded on s. 37(d) and went on to hold that the appellant was guilty of trafficking on application of the presumption under s. 37(da) of the Act. His direction therefore offends the double presumption rule to which we have already adverted. The conviction under s. 39B cannot therefore stand. It should be set aside and substituted with a conviction under s. 12(2), punishable under s. 39A(2) of the Act. We so order.

We will now hear arguments on the question of sentence.

We have heard arguments on sentence from both learned counsel and the learned deputy. The appellant has two previous convictions for offences of a similar nature. This is a very serious case. We cannot over emphasise our duty to have regard to the public interest. The weight of the drug in the present case is 154.3 grams, that is to say, 30 times the trigger point prescribed by s. 39A(2)(a) of the Act.

Taking into account the appellant's age and other relevant circumstances we would impose the maximum sentence of 20 years imprisonment, commencing from the date of his arrest and 12 strokes of the rotan.

Before we conclude we would like to record our appreciation to both the learned deputy, Encik Abdul Wahab Mohamed and Encik Hisyam Teh Poh Teik who have ably argued this appeal. But for their efforts this extempore judgment would not have been possible.